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No. 93-678

In the Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN DICKERSON, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
SCOTT S. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the courts below properly held that there is no genuine issue of material fact concerning the applicability of Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(A), to requested federal law enforcement records.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	12
Barney v. *IRS*, 618 F.2d 1268 (8th Cir. 1980)	13, 16
Crancer v. *United States Department of Justice*, 999 F.2d 1302 (1993), petition for cert. pending, No. 93-700 (filed Nov. 3, 1993)	16
Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987)	16
Doherty v. *United States Department of Justice*, 775 F.2d 49 (2d Cir. 1985)	17
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	11
Lead Industry Ass'n v. *OSHA*, 610 F.2d 70 (2d Cir. 1979)	
Lewis v. *IRS*, 823 F.2d 375 (9th Cir. 1987)	16
Local 3, IBEW v. *NLRB*, 845 F.2d 1177 (2d Cir. 1988)	17
Moorefield v. *United States Secret Service*, 611 F.2d 1021 (5th Cir.), cert. denied, 449 U.S. 909 (1980)	16
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)	10, 16
Nevas v. *Department of Justice*, 789 F. Supp. 445 (D.D.C. 1992), vacated *sub nom. Mapother* v. *Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993)	10-11
North v. *Walsh*, 881 F.2d 1088 (D.C. Cir. 1989)	16
Spannaus v. *United States Department of Justice*, 813 F.2d 1285 (4th Cir. 1987)	14, 16
United States v. *Doe*, 465 U.S. 605 (1984)	11

Cases—Continued: Page

United States Department of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) 10
Vaughn v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 15
Wright v. *OSHA*, 822 F.2d 642 (7th Cir. 1987) 16

Statutes:

Freedom of Information Act, 5 U.S.C. 552 2
5 U.S.C. 552(a)(4)(B) 3
5 U.S.C. 552(b) 16, 17
5 U.S.C. 552(6)(7)(A) (1982) 10
5 U.S.C. 552(b)(7)(A) 3, 9, 10, 13, 14, 15-16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 992 F.2d 1426. The opinions of the district court (Pet. App. 35a-39a, 40a-46a, 47a-50a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1993. A petition for rehearing was denied on August 3, 1993. Pet. App. 33a-34a. The petition for a writ of certiorari was filed on October 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for records of an investigation by the Federal Bureau of Investigation (FBI) into the disappearance of Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. Hoffa disappeared from Detroit in July 1975 and is widely thought to have been abducted and murdered. The FBI launched a nationwide investigation into Hoffa's disappearance. Pet. App. 1a-3a.

Materials relating to the Hoffa investigation are contained in two open investigatory files, one in FBI headquarters (FBIHQ) in Washington, D.C., and the other in the FBI Field Office in Detroit. Pet. App. 3a. The files responsive to petitioner's request contain

> documents detailing the FBI's theories regarding the case, investigative leads [the FBI is] pursuing (and those [the FBI does not] consider worthy of pursuit), information furnished by confidential sources, information indicating who[] the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation.

Id. at 66a. As of May 1990, the files consisted of 67 volumes in the FBIHQ and 332 volumes in the Detroit Field Office. *Id.* at 56a-57a.

In July 1989, petitioner submitted an FOIA request relating to the FBI's investigation into Hoffa's disap-

pearance. C.A. App. 15-23. Petitioner's request covered 15 categories of documents, including eyewitness accounts or reports thereof, witness statements, scientific tests, inventories of items seized pursuant to search warrants, transcripts of any electronic surveillance intercepts, and "[a]ll writings concluding, finding, speculating or otherwise referring to what happened to James Riddle Hoffa." *Id.* at 15-16.

Respondent denied the FOIA requests in August 1989 under Exemption 7(A), which exempts records compiled for law enforcement purposes when disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A); see C.A. App. 51-53. The Office of Information and Privacy in the Department of Justice affirmed the initial administrative denial of petitioner's request, but offered to make available all "public source" materials. *Id.* at 56-57.

2. a. In February 1990, petitioner filed this action against respondent under 5 U.S.C. 552(a)(4)(B), seeking to compel disclosure of the withheld documents. Petitioner contested the reliance by respondent Department of Justice on Exemption 7(A), alleging (1) that there was no concrete prospect of future enforcement proceedings relating to Hoffa's disappearance, and (2) that release of the requested documents could not reasonably be expected to interfere with any such investigation in any event. C.A. App. 13.

Petitioner and respondent filed cross-motions for summary judgment. In support of its summary judgment motion, respondent presented a declaration by Special Agent Jim E. Moody, the Chief of the Organized Crime Section of the FBI's Criminal Investigative Division. Pet. App. 65a-68a. In response to

petitioner's claim that future enforcement proceedings were no longer a realistic prospect, Moody explained that "[t]he FBI's investigation into Mr. Hoffa's disappearance is pending and ongoing," that "[w]e are continuing our efforts to develop evidence which can be utilized in criminal proceedings concerning individuals believed to be involved in Mr. Hoffa's disappearance," and that the FBI "intends to continue to pursue certain theories and strategies * * * with a view toward eventual criminal proceedings." *Id.* at 66a-67a. Moody explained that investigations of organized crime activities require "hard work over long periods of time" and call for "patient, tireless efforts to determine the identities of individuals who may possess information concerning a particular crime and even more patient efforts to gain the confidence of such individuals." *Id.* at 67a.

Moody also addressed the potential impact of disclosure on future enforcement proceedings. He explained that disclosure of the kind of information requested by petitioner would allow those responsible for Hoffa's disappearance "to learn the extent of the concrete information the FBI has in its possession and the thrust of our investigative efforts." Pet. App. 66a. The perpetrators could then use that information to frustrate the FBI's investigative efforts "by planting false leads, intimidating witnesses, and fabricating alibis." *Ibid.* Disclosure of the information, Moody explained, also would threaten the FBI's ability to corroborate statements by witnesses and suspects, a process requiring maintenance of the confidentiality of existing evidence. *Id.* at 67a-68a.

Respondent also submitted the declaration of Special Agent Angus B. Llewellyn, a supervisor of

the Freedom of Information-Privacy Acts Section of the FBIHQ Records Management Division. Pet. App. 51a-64a. Llewellyn, who was personally familiar with the FBI's handling of petitioner's FOIA requests, stated that the files contain the following eight categories of records (*id.* at 57a):

[1] Documents ~~describing leads~~ Setting Forth to be conducted.

[2] Documents containing information received from confidential informants.

[3] Information and documents provided by local law enforcement.

[4] Interviews of third parties and cooperating witnesses.

[5] Public source information such as newspaper clippings and press releases.

[6] Public and sealed court documents.

[7] Laboratory reports setting forth [the] results of examination.

[8] Polygraph worksheets and reports.

Llewellyn also corroborated Moody's statements regarding the impact of disclosure on future enforcement proceedings. Pet. App. 58a. He added that disclosure could interfere not only with federal enforcement proceedings, but also with "possible state and/or local proceedings concerning matters emanating from the FBI's investigative efforts." *Id.* at 59a.

b. The district court initially denied the cross-motions for summary judgment. Pet. App. 35a-39a. The court determined that, on the record before it, a genuine issue of material fact existed with respect to the likelihood of future enforcement proceedings. *Ibid.*

Respondent renewed its motion for summary judgment after submitting the declaration of William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division. Pet. App. 6a. Baker was directly responsible for directing the conduct of the FBI's criminal investigations and had overall supervisory authority for the investigation into Hoffa's disappearance. *Id.* at 69a-70a. Baker's responsibilities included the determination of whether the Hoffa investigation should be pursued and what FBI resources should be devoted to it. *Id.* at 71a. Baker informed the court that the investigation "still absorbs FBI management and field agent resources on a regular basis," and that he was still allocating resources to it. *Ibid.* Baker further explained that "[i]t is my judgment that the investigation * * * warrants the continued efforts of the FBI," and he based his decision, "in part, on [the] belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted." *Ibid.*

Acknowledging that 15 years had then passed since Hoffa's disappearance, Baker explained that FBI criminal investigations "often result in enforcement proceedings many years after the crimes were committed." Pet. App. 73a. He added that "with the passage of time persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." *Ibid.*

In connection with respondent's renewed motion for summary judgment, the district court ordered respondent to submit various documents collected from the Detroit Field Office in order to enable Moody to prepare for a possible deposition. Pet. App. 8a-9a. The court then reviewed the so-called "Moody file" in camera. *Id.* at 9a.

In July 1991, after reviewing the Moody file and the Baker declaration, the district court granted respondent's motion for summary judgment. Pet. App. 40a-46a. Noting that the Baker declaration was "much more specific" about the FBI's ongoing investigation of Hoffa's disappearance, the court concluded that that declaration, "in combination with the earlier affidavits, may be sufficient to establish that the records could reasonably be expected to interfere with a prospective law enforcement proceeding." *Id.* at 43a. In addition, after conducting "a careful and thorough review" of "each and every document" in the Moody file, the court was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." *Id.* at 44a.

The district court turned next to the question whether the release of the requested documents could reasonably be expected to interfere with such proceedings. The court noted that "[t]he FBI need not justify [invocation of Exemption 7(A)] on a document-by-document basis, but may group the documents into distinct functional categories and show how the release of each category would likely interfere with the enforcement proceeding." Pet. App. 44a-45a. The court concluded that the categories

identified in Special Agent Llewellyn's declaration were "proper functional categories," and that "the affidavits of Agents Llewellyn and Moody [specify] how disclosure could reasonably be expected to interfere with the prospective law enforcement proceedings and hinder the efforts to bring those responsible to justice." *Id.* at 45a.

3. The court of appeals affirmed. Pet. App. 1a-32a. It first held that the district court did not err in refusing to order a document-by-document index. *Id.* at 10a-14a. It next sustained the district court's reliance on the Moody file, emphasizing that the documents had not been selected for the purpose of allowing the court to conduct in camera review, but had been prepared to brief Special Agent Moody on the status of the investigation. The court of appeals explained that the district court had reviewed the Moody file on its own initiative and had reasonably concluded that it sufficiently corroborated the government's position. *Id.* at 13a-14a.

Based on its review of the government's declarations and the Moody file, the court of appeals also held that the record supports the finding that the investigation into Hoffa's disappearance is ongoing. The court noted, in particular, that Assistant Director Baker, who is responsible for determining whether to pursue an investigation, stated that he is continuing to allocate investigative resources to the Hoffa case. Pet. App. 15a-16a.

Finally, the court of appeals sustained the district court's determination that production of the records could reasonably be expected to interfere with the continuing investigation. Pet. App. 16a-18a. In the court of appeals' view, the district court's finding on

that issue was supported by the Moody and Llewellyn declarations, which establish that disclosure of the records in this ongoing racketeering investigation could result in destruction of evidence and tampering with witnesses. *Id.* at 16a-17a. The court also concluded that disclosure could interfere both with the corroboration of evidence in the Hoffa case and with the investigations in other pending and prospective criminal proceedings. *Id.* at 17a-18a.[1]

ARGUMENT

The decision of the court of appeals involves the application of settled principles under FOIA Exemption 7(A) to the facts of a particular criminal investigation. The court's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Exemption 7(A) of the FOIA authorizes an agency to withhold "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). This Court has recognized that unlike certain other FOIA exemptions, which "seem to require a showing that the factors made relevant by

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[1] Judge Beckwith wrote a concurring opinion indicating that the government could also have justified its decision to withhold the records under other FOIA exemptions. Pet. App. 19a-21a. Judge Batchelder dissented in part. She agreed with the court's finding that future enforcement proceedings were likely, but she disagreed with the majority in other respects. *Id.* at 21a-32a.

the statute are present in each distinct situation," the language of Exemption 7(A) "appears to contemplate that certain generic determinations might be made." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-224 (1978). In light of the purposes underlying that exemption, moreover, this Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236.[2]

Petitioner contends (Pet. 14-18) that the court of appeals erred in determining that future enforcement proceedings were likely in the Hoffa case. The court of appeals held that Exemption 7(A) is available when there is "at least 'a reasonable chance that an enforcement proceeding will occur.'" Pet. App. 10a (quoting *Nevas* v. *Department of Justice*, 789 F. Supp.

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[2] When this Court decided *Robbins Tire*, Exemption 7(A) shielded law enforcement records whose disclosure "*would* * * * interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1982) (emphasis added). In 1986, Congress amended Exemption 7(A) to require the government to show only that disclosure "*could reasonably be expected to* interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1988) (emphasis added). That change "represents a considered congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7].'" *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989). The withholding at issue in this case is therefore governed by a more generous standard than the one in place when the decision in *Robbins Tire* was issued.

445, 448 (D.D.C. 1992), vacated on other grounds *sub nom. Mapother* v. *Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993)). Applying that standard, the court affirmed the district court's determination that the record established a "reasonable prospect" (Pet. App. 16a) of future enforcement proceedings.

Petitioner does not contest the legal standard employed by the court of appeals. See Pet. 16-17 (relying on *Nevas*, 789 F. Supp. at 448). Rather, he objects to the court's application of that standard to the facts of this case, arguing that the record establishes a genuine issue of material fact concerning the likelihood of future enforcement proceedings. That narrow, case-specific question, however, does not warrant this Court's review. Cf. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (declining to review finding of fact concurred in by court of appeals and district court); *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984) (same).

In any case, the conclusion concurred in by the courts below is supported by the record. Special Agent Moody, Chief of the FBI's Organized Crime Section, declared under oath that the FBI is "continuing [its] efforts to develop evidence which can be utilized in criminal proceedings concerning individuals believed to be involved in Mr. Hoffa's disappearance," and that the FBI "intends to continue to pursue certain theories and strategies * * * with a view toward eventual criminal proceedings." Pet. App. 66a-67a. Moody's statements are corroborated by the declaration of Assistant Director Baker, the official with overall responsibility for deciding whether the Hoffa investigation should be pursued. *Id.* at 71a. In his declaration, Baker confirmed that

the investigation into Hoffa's disappearance "still absorbs FBI management and field agent resources on a regular basis," and that "[i]t is my judgment that the investigation * * * warrants the continued efforts of the FBI." *Ibid.* Finally, in addition to these sworn declarations, the court of appeals and the district court conducted in camera review of the so-called "Moody file" and found that its contents dispelled any doubt concerning the prospect of future enforcement proceedings. *Id.* at 14a, 44a.[3]

2. Petitioner argues (Pet. 18-24) that even if there is a reasonable prospect of future law enforcement proceedings, the court of appeals erred in holding that release of the requested records could reasonably be expected to interfere with the proceedings.

Petitioner's FOIA request, however, seeks disclosure of all "[e]yewitness accounts * * * of the abduction of Mr. Hoffa" and all "[w]itness statements," as well as all "[s]cientific tests, including, but not limited to, blood samples, photographs, fingerprints, and analysis of tire treads and tracks." C.A. App. 15. He further requested the "[t]ranscripts and logs of

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[3] Petitioner argues (Pet. 16-17 & n.13) that a genuine issue of material fact is created by extrajudicial statements of other FBI personnel. The officials directly responsible for the investigation, however, represented that criminal prosecutions can be conducted and that the FBI is pursuing the investigation on that basis. It was proper to credit the official and considered judgment of the FBI on that question. Under these circumstances, the court of appeals did not err in affirming the district court's decision to grant summary judgment. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986) ("If the evidence [put forward by the party opposing summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).

any intercepts obtained in connection with * * * electronic surveillance orders," all search warrants "sought, or obtained" in the course of the investigation, and any affidavits submitted in support of such warrants. *Id.* at 16. Petitioner's request also encompassed "[a]ll writings concluding, finding, speculating or otherwise referring to what happened to James Riddle Hoffa, his body, and the identities of the persons responsible or involved in his disappearance and/or death." *Ibid.* In short, petitioner requested many categories of documents whose disclosure would self-evidently interfere with the ongoing investigation by providing a detailed road map of the government's past and future investigative efforts.

As the court of appeals concluded, the FBI made a sufficient showing of the adverse consequences of disclosing the information requested by petitioner. See Pet. App. 16a-18a. The FBI's declarations explain that disclosure of the requested documents would enable those responsible for Hoffa's disappearance "to learn the extent of the concrete information the FBI has in its possession and the thrust of our investigative efforts." *Id.* at 66a. The perpetrators could then frustrate the FBI's investigative efforts "by planting false leads, intimidating witnesses, and fabricating alibis." *Ibid.* Disclosure of the information also would jeopardize the FBI's ability to corroborate statements by witnesses and suspects. *Id.* at 58a, 67a-68a. Under these circumstances, the record demonstrates that disclosure "could reasonably be expected to interfere" with enforcement proceedings, as required by Exemption 7(A). See, *e.g.*, *Barney* v. *IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980)

(holding that "disclosure of such records as witness statements, documentary evidence, agent's work papers and internal agency memoranda * * * would necessarily interfere with such proceedings by prematurely revealing the government's case"); *Spannaus* v. *United States Department of Justice*, 813 F.2d 1285, 1287 (4th Cir. 1987).

Petitioner objects to the court's use of the Moody file in determining that the government properly invoked Exemption 7(A). He argues (Pet. 19) that the Moody file is not "representative" of the contents of the Hoffa files as a whole, and that it was an "advocacy document[]" designed to "include[] only fresh inquiries and other information that *supported* the Government's position." As the court of appeals explained (Pet. App. 8a-9a, 13a-14a), however, the file was assembled to familiarize Special Agent Moody with the status of the Hoffa investigation. The Moody file was not assembled with an eye toward placing it in evidence, and it was made part of the record only because the district court ordered respondent to submit it. See *id.* at 48a.

Petitioner also asserts (Pet. 20-21) that some of the document categories identified in the government's declaration are not sufficiently specific to allow meaningful evaluation of the potential effect of disclosure. As the district court explained, however, respondent "specifie[d] through the affidavits of Agents Llewellyn and Moody how disclosure could reasonably be expected to interfere with the prospective law enforcement proceedings and hinder efforts to bring those responsible to justice." Pet. App. 45a. The district court correctly determined that those decla-

rations specified the functional categories of requested documents[4] and established

> that disclosure would reveal the FBI's current knowledge regarding Hoffa's disappearance, the direction and scope of the current efforts[,] the leads abandoned and those individuals considered prime suspects. With such information[,] the perpetrator(s) could take steps to destroy or tamper with evidence, intimidate and threaten witnesses, construct a false alibi or fabricate other evidence. Also, disclosure could interfere with the ability to corroborate statements of witnesses or suspects. Each of these types of interference justif[ies] application of the exemption from disclosure under [Exemption 7(A)].

Ibid. Petitioner's fact-intensive claim to the contrary does not warrant further review.

Finally, petitioner argues (Pet. 22-23) that the declarations submitted by the government do not provide sufficient detail about the individual documents within each category. As discussed above (see pp. 9-10, *supra*), this Court has made clear that in contrast with other FOIA exemptions, Exemption

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[4] The Moody declaration specified that petitioner's request encompasses documents "detailing the FBI's theories regarding the case, investigative leads [the FBI is] pursuing (and those [the FBI does not] consider worthy of pursuit), information furnished by confidential sources, information indicating who[] the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation." Pet. App. 66a; see also *id.* at 57a (Llewellyn declaration).

7(A) may appropriately be handled through a categorical approach. See *Robbins Tire*, 437 U.S. at 236. Accordingly, the courts of appeals have consistently followed that course, refusing to require the kind of document-by-document approach to withholding that petitioner advances here. See, *e.g.*, *North* v. *Walsh*, 881 F.2d 1088, 1097 n.13 (D.C. Cir. 1989); *Lewis* v. *IRS*, 823 F.2d 375, 379-380 (9th Cir. 1987); *Wright* v. *OSHA*, 822 F.2d 642, 645-646 (7th Cir. 1987); *Spannaus* v. *United States Department of Justice*, 813 F.2d at 1288-1289; *Curran* v. *Department of Justice*, 813 F.2d 473, 475-476 (1st Cir. 1987); *Barney* v. *IRS*, 618 F.2d at 1272-1274; *Moorefield* v. *United States Secret Service*, 611 F.2d 1021, 1023-1024 (5th Cir.), cert. denied, 449 U.S. 909 (1980).[5]

3. Petitioner argues (Pet. 25-26) that the court of appeals, in effect, refused to apply FOIA's requirement that the government release any "reasonably segregable" (5 U.S.C. 552(b)) nonexempt portion of a requested record. He contends (Pet. 25) that the court adopted a blanket rule refusing to apply that provision of FOIA to cases arising under Exemption 7(A).

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[5] In another case involving a request for the Hoffa files, the Eighth Circuit, sitting en banc, recently held that in a case arising under Exemption 7(A), the government is not required to submit a document-by-document index such as the one required in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). See *Crancer* v. *United States Department of Justice*, 999 F.2d 1302 (1993), petition for cert. pending, No. 93-700 (filed Nov. 3, 1993). We will furnish counsel for petitioner with a copy of our response to the petition in *Crancer*.

The court of appeals, however, merely held that "[o]n the record before us" (Pet. App. 19a), there was no significant prospect that "reasonably segregable" nonexempt materials could be extracted from the withheld records. As the court explained, if enough information were excised to make the records "useless to any lawbreaker," the redacted portions would similarly be "useless to [petitioner] and his newspaper." *Ibid.* FOIA requires only that the government release "*reasonably* segregable" portions of withheld documents. 5 U.S.C. 552(b) (emphasis added). It is well settled that a court may decline to require the excision of exempt information from withheld material when to do so "would render [the records] either nonsensical or perhaps too illuminating" of privileged matters. *Local 3, IBEW* v. *NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); see also, *e.g.*, *Doherty* v. *United States Department of Justice*, 775 F.2d 49, 53 (2d Cir. 1985). The court of appeals' routine application of that principle to this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
SCOTT S. MCINTOSH
Attorneys

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